TENAGA NASIONAL BHD v. WRP ASIA PACIFIC SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
SURAYA OTHMAN JCA
YEOH WEE SIAM JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1884-10-2016]
21 AUGUST 2018

UTILITIES: *Electric – Claim for arrears – Discovery of inconsistency at substation meter – Inconsistency caused incorrect recording of use of electricity at consumer's premises – Electricity provider sent notice for sum in arrears in electricity bill – Back-billing for undercharge of consumer's electricity consumption – How sum in arrears calculated and arrived at – Whether should be calculated from when inspection at consumer's premises took place and consumer being informed of defect – Whether electricity provider, as licensee, may recover from consumer, charges due to licensee – Licensee Supply Regulations 1990, regs. 3(1) & 11(2)*

WORDS & PHRASES*: 'From the date the consumer has been undercharged' – Interpretation of – Whether to be interpreted to relate to date when inspection took place and consumer informed of defect – Back-billing for undercharge of electricity consumption – How sum in arrears calculated and arrived at – Licensee Supply Regulations 1990, regs. 3(1) & 11(2)*

The appellant, Tenaga Nasional Berhad ('TNB'), discovered an inconsistency at the substation meter, which was believed to have caused an incorrect recording of use of electricity by the respondent ('the plaintiff'). Following two inspections carried out at the plaintiff's premises, TNB issued a notice to the plaintiff, for arrears in electricity bill, amounting to RM2,754,623.60 ('the sum'). Despite several requests by the plaintiff, TNB refused and/or failed to avail the plaintiff with the particulars of how the computations were done and how the sum was arrived at. At the High Court, the plaintiff commenced an action against TNB, seeking, *inter alia*, (i) declarations that (a) the notice to disconnect electricity supply ('notice of disconnection') dated 15 June 2015 was null and void; and (b) the retrospective adjustment and calculation of the sum, in the notice of disconnection, was null and void; (ii) an injunction restraining TNB from cutting off, disconnecting or disturbing the supply of electricity at the plaintiff's premises; and (iii) damages. The High Court allowed the plaintiff's action with costs. Hence, the present appeal. The issues raised by TNB concerned (i) the meaning and intent of the proviso to reg. 11(2) of the Licensee Supply Regulations 1990 ('Regulations') where it was argued that the phrase 'from the date the consumer has been undercharged', appearing in the said proviso, should be interpreted to relate to the date when the inspection took place and the consumer being informed of the defect ('TNB's submission on issue (i)'); and (ii) whether a licensee may recover, from a consumer, any charges due to the licensee, TNB, in respect of the supply of electricity under reg. 3(1) of the Regulations.

Held (allowing appeal; setting aside order of High Court)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) Under the proviso to reg. 11(2) of the Regulations, the back billing for the undercharge of the plaintiff consumer account is limited to a retrospective adjustment not exceeding three months from the date that the consumer had been informed about being undercharged, namely from the date of being informed through three notices of demand issued by TNB on (i) 27 June 2012 for RM1,271,137.44; (ii) 10 August 2012 for RM540,875.96; and (iii) 10 September 2012 for RM489,988.76. Therefore, TNB's submission on issue (i) could not be acceded to. The language employed in the said proviso is clear and unambiguous. The proviso to reg. 11(5) of the Regulations further specifically employs the phrase 'the consumer has been informed of the discovery or changes'. Had it been the intention of the Legislature to provide that the cut-off date for retrospective billing, in the proviso to reg. 11(2) of the Regulations, means the date of inspection or discovery, they would have employed the same phrase as contained in the proviso to reg. 11(5). (paras 14-17)

(2) TNB had the right to recover any charges due from the consumer after the respective dates of the letters of demands *ie* 27 June 2012, 10 August 2012 and 10 September 2012. In effect, the correct positions were, in respect of the notice of demands dated (i) 27 June 2012, TNB was entitled to claim retrospective billing three months from 27 March 2012 till 27 June 2012; (ii) 10 August 2012, TNB was entitled to claim retrospective billing three months from 10 May 2012 till 10 August 2012; and (iii) 10 September 2012, TNB was entitled to claim retrospective billing three months from 10 June 2012 till 10 September 2012. Therefore, any claim after those three cut-off dates of the three letters of demand, under reg. 3(1) of the Regulations, were claims which TNB was statutorily entitled to claim. (paras 19 & 20)

(3) The notice of disconnection was not entirely bad. It was only bad to the extent where it involved sums claimed by TNB based on the two dates of inspection *ie* 16 November 2011 and 1 March 2012. However, in relation to sums claimed by TNB from the three cut-off dates of the letters of demand to the dates of notice of disconnection, that part of the notice of disconnection was good. (para 21)

***Bahasa Malaysia** Headnotes*

Perayu, Tenaga Nasional Berhad ('TNB'), mendapati ketidakselarasan pada meter substesyen, yang dipercayai mengakibatkan catatan penggunaan elektrik, oleh responden ('plaintif'), yang tidak tepat. Susulan dua pemeriksaan yang dijalankan di premis plaintif, TNB mengeluarkan notis kepada plaintif, untuk tunggakan bil elekrik, berjumlah RM2,754,623.60 ('jumlah tersebut'). Walaupun terdapat beberapa permintaan daripada plaintif, TNB enggan dan/atau gagal memberi butiran kepada plaintif tentang

bagaimana pengiraan dibuat dan bagaimana jumlah tersebut dicapai. Di Mahkamah Tinggi, plaintif memulakan tindakan terhadap TNB, memohon, antara lain, (i) pengisytiharan bahawa (a) notis pemotongan bekalan elektrik ('notis pemotongan') bertarikh 15 Jun 2015 tidak sah dan terbatal; dan (b) kaedah pelarasan kebelakang dan pengiraan jumlah tersebut, dalam notis pemotongan tersebut, tidak sah dan terbatal; (ii) injunksi menghalang TNB memotong, menghentikan atau mengganggu bekalan elektrik di premis plaintif; dan (iii) ganti rugi. Mahkamah Tinggi membenarkan tindakan plaintif dengan kos. Maka timbul rayuan ini. Isu-isu yang dibangkitkan oleh TNB berkenaan (i) maksud dan niat proviso peraturan 11(2) Peraturan-peraturan Pemegang Lesen 1990 ('Peraturan-peraturan') dengan menghujahkan ungkapan 'from the date the consumer has been undercharged', dalam proviso tersebut, harus ditafsir sebagai berkait dengan tarikh pemeriksaan dijalankan dan konsumer dimaklumkan tentang kecacatan ('hujahan TNB tentang isu (i)'); dan (ii) sama ada pemegang lesen boleh memperoleh, daripada konsumer, apa-apa caj terhutang pada pemegang lesen, iaitu TNB, untuk bekalan elektrik bawah peraturan 3(1) Peraturan-peraturan.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)

Oleh Abang Iskandar HMR menyampaikan penghakiman mahkamah:

(1) Bawah peraturan 11(2) Peraturan-peraturan, pengiraan kebelakang bayaran kurang akaun konsumer plaintif, terhad pada pelarasan retrospektif tidak lebih tiga bulan dari tarikh konsumer dimaklumkan tentang bayaran kurang, iaitu dari tarikh makluman melalui tiga notis tuntutan yang dikeluarkan oleh TNB pada (i) 27 Jun 2012 untuk jumlah RM1,271,137.44; (ii) 10 Ogos 2012 untuk jumlah RM540,875.96; dan (iii) 10 September 2012 untuk jumlah RM489,988.76. Oleh itu, hujahan TNB tentang isu (i) tidak boleh disetujui. Bahasa yang diguna dalam proviso tersebut jelas dan tidak kabur. Proviso peraturan 11(5) Peraturan-peraturan selanjutnya, dengan khusus, mengguna ungkapan 'the consumer has been informed of the discovery or changes'. Jika Badan Perundangan mempunyai niat untuk memperuntukkan agar tarikh pemotongan bil kebelakang, dalam proviso peraturan 11(2) Peraturan-peraturan, bermakna tarikh pemeriksaan atau dapatan, mereka akan mengguna ungkapan yang sama seperti yang terkandung dalam proviso peraturan 11(5).

(2) TNB berhak memperoleh kembali apa-apa caj tertunggak daripada konsumer selepas tarikh-tarikh surat tuntutan iaitu 27 Jun 2012, 10 Ogos 2012 dan 10 September 2012. Hakikatnya, kedudukan yang betul adalah, berkenaan notis tuntutan bertarikh (i) 27 Jun 2012, TNB berhak menuntut bil tiga bulan kebelakang dari 27 Mac 2012 hingga 27 Jun 2012; (ii) 10 Ogos 2012, TNB berhak menuntut bil tiga bulan kebelakang dari 10 Mei 2012 hingga 10 Ogos 2012; dan

(iii) 10 September 2012, TNB berhak menuntut tuntutan bil kebelakang dari 10 Jun 2012 hingga 10 September 2012. Oleh itu, apa-apa tuntutan selepas tiga tarikh pemotongan dalam tiga surat tuntutan ini, bawah peraturan 3(1) Peraturan-peraturan, adalah tuntutan yang TNB berhak tuntut bawah statut.

(3) Notis pemotongan tersebut bukanlah cacat keseluruhannya. Notis tersebut hanya cacat setakat yang melibatkan jumlah yang dituntut oleh TNB berasaskan dua tarikh pemeriksaan iaitu 16 November 2011 dan 1 Mac 2012. Walau bagaimanapun, berkenaan jumlah yang dituntut oleh TNB dari tiga tarikh pemotongan dalam surat tuntutan hingga tarikh-tarikh notis pemotongan, bahagian notis pemotongan tersebut adalah teratur.

Case(s) referred to:

Tenaga Nasional Bhd v. Calsonic Compressor (Malaysia) Sdn Bhd [2009] 9 CLJ 699 HC ***(refd)***

Tenaga Nasional Bhd v. Kamarstone Sdn Bhd [2013] 7 CLJ 462 CA ***(foll)***

Legislation referred to:

Licensee Supply Regulations 1990, regs. 3(1), 11(2), (5)

For the appellant - Hadi Mukhlis; M/s Steven Thiru & Sudhar Partnership
For the respondent - Kumar & Moses Susayan; M/s Raja Badrol, Ramli & Azizi

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCVC-403-07-2015 (overruled).]

Reported by Najib Tamby

JUDGMENT

Abang Iskandar JCA:

Facts Of The Case

[1] Pursuant to two inspections which were purportedly carried out at WRP Asia Pacific Sdn Bhd ("the plaintiff")'s factory on 16 November 2011 and 1 March 2012, Tenaga Nasional Berhad ("TNB"), had issued a notice to the plaintiff for the arrears in the plaintiff's electricity bill amounting to RM2,754,623.60.

[2] The charges were regularised by TNB when TNB found that there was an inconsistency at the substation metre. TNB claimed that, because of the inconsistency, the metre did not record the correct use of electricity by the plaintiff.

[3] Despite several requests by the plaintiff, including in a meeting held on 24 June 2015 and *vide* letter dated 8 July 2015, TNB refused and/or failed to avail the plaintiff with the particulars as to how the computations were done and how the sum of RM2,754,263.60 was arrived at.

[4] In this action, the plaintiff sought for:

(i) satu deklarasi bahawa "notis pemotongan bekalan elektrik" bertarikh 15.6.2015 adalah tidak sah dan terbatal;

(ii) satu deklarasi bahawa kaedah pelarasan kebelakang dan pengiraan tuntutan RM2,754,263-60 dalam "notis pemotongan bekalan elektrik" bertarikh 15.6.2015 adalah tidak sah dan terbatal;

(iii) satu injunksi menghalang defendan sama ada melalui diri mereka sendiri dan/atau agen-agen mereka dan/atau wakil-wakil mereka dan/atau pekerja-pekerja mereka ataupun disebaliknya dalam apa carapun daripada memotong dan/atau memberhentikannya dan/atau mengganggu bekalan eletrik kepada kilang kedua plaintif di Lot 57515753, Jalan Salak Tinggi, 43900 Sepang, Selangor Darul Ehsan, berasaskan kepada pemeriksaan yang kononnya telah dijalankan oleh Defendant pada 16.11.2011 dan 1.3.2012 dan menurut notis pemotongan defendan bertarikh 15-6-2015;

(iv) ganti rugi untuk ditaksirkan;

(v) kos atas dasar indemnity;

(vi) faedah atas gantirugi;

(vii) relif-relif selanjut dan lain-lain yang dianggap wajar dan suai manfaat oleh Mahkamah yang mulia ini.

Finding Of Learned High Court Judge

[5] The learned High Court Judge had allowed most of the prayers sought for by the plaintiff with costs of RM20,000.

[6] Dissatisfied with the decision, TNB had filed this appeal to the Court of Appeal. We noted that there was no cross-appeal by the plaintiff.

The Appeal

[7] Before us, two issues were raised by learned counsel for TNB namely (i) the meaning and intent of the proviso to reg. 11(2) of the Licensee Supply Regulations 1990; and (ii) whether a licensee may recover from a consumer any charges due to the licensee (TNB) in respect of the supply of electricity under reg. 3(1) of the said Regulations 1990.

[8] On the first issue regarding the true construction to be given to the meaning and intent of the proviso to reg. 11(2) of the Licensee Supply Regulations 1990, this proviso had come into the limelight because TNB had claimed for back billing, thus a retrospective adjustment of the plaintiff's electric consumption charges had become necessary.

[9] The plaintiff's position on this issue, in particular the said proviso, has been that TNB is only entitled to charge the consumer for "the period for any retrospective adjustment shall not exceed three months from the date the

consumer has been informed about being undercharged or overcharged". The contentious issue about this proviso has been what is meant by the phrase 'from the date the consumer has been informed about being undercharged or overcharged.'

[10] It has been the plaintiff's position that the said phrase meant that the three months relate to the date from which the consumer had been informed about being undercharged, namely when the consumer, as in this case, received the letters of demand from TNB which contained the charges that the consumer needed to pay TNB. In such a scenario, the three months would operate to take effect backwards from the date of the letters of demand.

[11] TNB's position on the proviso to reg. 11(2) is markedly different. That position can be clearly seen in the written submissions by learned counsel for TNB at p. 10, para. 28 therein, where it was stated:

> (2) limits any retrospective undercharges to 3 months from the date the consumer is informed of the circumstances which necessitated the adjustments of the consumer's account. The determinative date here is when the consumer is made aware ("informed") of the circumstances stipulated under Regulation 11(2) (i.e. when TNB discovered that its meter was not correctly reading the consumer's electricity consumption).

[12] As it had come to pass, the learned High Court Judge agreed with the interpretation to the said proviso as was assigned to it by the plaintiff. At para. [18] of his grounds of judgment, the learned judge said:

> Saya dapati Peraturan 11(2) tersebut hanya membenarkan tempoh bil kebelakang tersebut hanya boleh dikenakan tidak lebih dari 3 bulan 'setelah pengguna dimaklumkan tentang dia dikenakan bil yang berkurang.'

[13] Premised upon that critical finding, the learned judge allowed most of the plaintiff's prayers.

[14] On this issue, we agree with the learned High Court Judge that the back billing for the undercharge of the plaintiff consumer account under the proviso to reg. 11(2) of the Licensee Supply Regulations 1990 is limited to a retrospective adjustment not exceeding three months from the date that the consumer has been informed about being undercharged, namely from the date of being informed through the three notices of demand issued by TNB ie:

(i) on 27 June 2012 for RM1,271,137.44

(ii) on 10 August 2012 for RM540,875.96 = RM2,754,263.60.

(iii) on 10 September 2012 for RM489,988.76

[15] As such with respect, we are not able to accede to the submission by learned counsel for TNB that the phrase "from the date the consumer has been informed about being undercharged, appearing in proviso to reg. 11(2) should be interpreted to relate to the date when the inspection took place and the consumer being informed of the defect." A

[16] To our minds, the language employed in the said proviso is clear and unambiguous. It refers to the date the consumer has been informed about being undercharged or overcharged. In this case, that was done through the three notices of demand of TNB. B

[17] Our view is fortified by reference to the proviso to reg. 11(5) of the same Regulations, which specifically employs the phrase "the consumer has been informed of the discovery or changes". Had it been the intention of the Legislature to provide that the cut-off date for retrospective billing in the proviso to reg. 11(2), means the date of inspection or discovery, then they would have employed the same phrase as contained in the proviso to reg. 11(5). C D

[18] We are also aware of the decision of the Court of Appeal in the case of *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2013] 7 CLJ 462; [2014] 1 MLJ 391 which affirmed the view expressed in the High Court case of *Tenaga Nasional Bhd v. Calsonic Compressor (M) Sdn Bhd* [2009] 9 CLJ 699; [2009] 8 MLJ 793 that the effective date was "the date that the defendant had been informed about being undercharged". We find no reason to depart from that decision by the Court of Appeal in the *Kamarstone* case (*supra*). E

[19] Now, we deal with the second issue which is concerned with reg. 3(1) of the said Regulations 1990 where a licensee may recover from a consumer any charges due to the licensee (TNB) in respect of the supply of electricity. This is the second part of TNB's claim pursuant to the notice of disconnection. This means that TNB has the right to recover any charges due from the consumer after the respective dates of the letters of demand ie, 27 June 2012, 10 August 2012 and 10 September 2012. So in effect, the correct positions are as follows: F G

(i) In respect of the notice of demand dated 27 June 2012, TNB is entitled to claim retrospective billing three months from 27 March 2012 till 27 June 2012.

(ii) In respect of the notice of demand dated 10 August 2012, TNB is entitled to claim retrospective billing three months from 10 May 2012 till 10 August 2012. H

(iii) In respect of the notice of demand dated 10 September 2012, TNB is entitled to claim retrospective billing three months from 10 June 2012 till 10 September 2012. I

[20] Therefore, any claim after those three cut-off dates of the three letters of demand under reg. 3(1) of the said 1990 Regulations are claims which the TNB is statutorily entitled to claim thereunder.

[21] Now, adverting to the notice of disconnection from TNB to the plaintiff amounting to RM2,754,263.60, we find that the notice is not entirely bad. It is only bad to the extent where it involves sums claimed by TNB based on the two dates of inspection ie, 16 November 2011 and 1 March 2012. However, in relation to sums claimed by TNB from the three cut-off dates of the letters of demand to the dates of notice of disconnection, that part of the notice of disconnection is good.

[22] Premised on the above, we are unanimous in our decision that this appeal be allowed in part. We set aside the orders (a) and (b) by the High Court dated 2 September 2016 and we substitute it with our order as stated above by us in paras. [19], [20], and [21]. We further order that the injunction which was allowed in para. (c) of the High Court order be set aside. We order parties to bear their own costs. Deposit is refunded.